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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,
8 Plaintiff,

9 -vs-

10 YOSIO EDUARDO DELGADO-YONG,
11 Defendant.
12

NO. CR-06-6052-WFN-1

ORDER

13 The Court reserved ruling on Defendant's Motion to Dismiss (Ct. Rec. 19) at the first
14 pretrial conference held on February 27, 2007. The Court did so to take into consideration
15 the ruling in *Morales-Izquierdo v. Gonzales*, ___ F.3d ___, 2007 WL 329132 (9th Cir. 2/6/07)
16 which was orally cited by the government. The case was decided after the Government filed
17 its briefing on this Motion.

18 The Court has reviewed the file, the briefing on the Motion, considered the comments
19 of counsel and the ruling in *Morales-Izquierdo v. Gonzales*. For the reasons state below the
20 Defendant's Motion to Dismiss is granted.

21 **BACKGROUND**

22 The Defendant was indicted for being an alien in the United States after three prior
23 deportation on September 7, 2001, September 14, 2001 and May 31, 2002, in violation of 18
24 U.S.C. § 1326. It is undisputed that his first deportation occurred after a hearing before an
25 immigration judge [IJ], and the second and third deportations were pursuant to reinstatement
26 orders based upon the first deportation.

1 The Defendant requests that the indictment be dismissed for two reasons: 1) because
2 the reinstatement orders violate the provisions of the immigration statute; and 2) because the
3 reinstatement orders of removal are based on a hearing before an immigration judge [IJ] that
4 violated the Defendant's due process rights.

5 DISCUSSION

6 "In a criminal prosecution under § 1326, the Due Process Clause of the Fifth
7 Amendment requires a meaningful opportunity for judicial review of the underlying
8 deportation." *United States v. Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir.1998) implied
9 overruled on other grounds in *United States v. Ballesteros-Ruiz*, 319 F.3d 1101, 1105 (9th
10 Cir.2003). "If the defendant's deportation proceedings fail to provide this opportunity, the
11 validity of the deportation may be collaterally attacked in the criminal proceeding." *Zarate-*
12 *Martinez*, 133 F.3d at 1197. However, a collateral attack cannot be made if the defendant's
13 waiver of his right to appeal the deportation order was valid, i.e. considered and intelligent.
14 *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000). The waiver of appeal made
15 before an IJ will not be considered and intelligent if the IJ neglects to advise the person of
16 something that rises to the level of a due process violation. Here, Defendant may make a
17 collateral attack on the validity of his deportation hearing because he alleges due process
18 violations at that hearing. To succeed on such a collateral attack requires the Defendant to
19 prove: "(1) his due process rights were violated by defects in his underlying deportation
20 proceedings, and (2) he suffered prejudice as a result of the defects. *Id.*

21 **The reinstatement orders and the immigration statute.** The Defendant asserts
22 that the two reinstatement orders of deportation were signed by immigration officers, not an
23 IJ, and that the officers did not have authority to do so under the statute. The Immigration and
24 Nationality Act [INA] allegedly does not give the Attorney General the power to reinstate a
25 prior order of deportation without allowing for a hearing before an IJ. Defendant argues that
26 any regulations that allow for some one other than the IJ to order reinstatement are *ultra vires*

1 to the INA. Accordingly, Defendant argues that the reinstatement orders must be invalidated
2 due to this jurisdictional defect. He finally argues that jurisdictional errors are never harmless
3 so Defendant was necessarily prejudiced and therefore the government may not rely on the
4 deportations of September 14, 2001 and May 31, 2002.

5 In his briefing Defendant acknowledged that the case upon which this argument is
6 based, *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004) had been withdrawn to
7 allow for *en banc* review, *Morales-Izquierdo v. Ashcroft*, 423 F.3d 1118 (9th Cir. 2005), and
8 that review had been stayed. *Morales-Izquierdo v. Ashcroft*, 432 F.3d 1112 (9th Cir. 2006).
9 The Defendant relies on the reasoning of the case and also seeks to preserve his objections to
10 the reinstatement process pending the outcome of the *en banc* review.

11 Defendant's argument has now been foreclosed by the ruling in *Morales-Izquierdo v.*
12 *Gonzales*, ___ F.3d ___, 2007 WL 329132 (9th Cir. 2/6/07). The *en banc* court has
13 determined that regulations authorizing immigration officers, rather than IJs to reinstate
14 removal orders of aliens who illegally reenter the United States constitutes a valid
15 interpretation of the Immigration and Nationality Act.

16 **The reinstatement orders of removal and the hearing before the immigration judge**
17 **[IJ]**. The Defendant's second basis for dismissal is that the two latest deportations noted in the
18 indictment are illegal because they are based on a hearing before an IJ in which Defendant's
19 due process rights were violated. Specifically the Defendant asserts that the IJ failed to
20 adequately advise him of the "fast track" voluntary departure procedure and to develop his
21 eligibility under it.

22 An IJ must advise the alien at a deportation proceeding of potential grounds for
23 relief or the proceeding is defective. *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th
24 Cir. 2000). The Government has the burden to show that an alien was sufficiently
25 advised of his rights. *Zarate-Martinez*, 133 F.3d at 1197. As long as an alien is eligible for the
26 fast track voluntary departure under 8 U.S.C. § 1229c(a)(1) the IJ is required to advise him of

1 that right. *United States v. Ortiz-Lopez*, 385 F.3d 1202 (9th Cir. 2004). Here the Defendant
2 was eligible provided he had the \$100 necessary to pay for departure and the IJ so advised the
3 Defendant. The only issue is whether the IJ's advice regarding the option was
4 adequate.

5 The Court has reviewed the tape of the deportation hearings. At the first hearing the IJ
6 continued the matter to allow the Defendant to attempt to retain counsel. At the second
7 hearing, where the Defendant was unrepresented, the IJ advises the Defendant that voluntary
8 departure would require \$100 for him to pay his way back to Mexico. The IJ then asked "Do
9 you have that?" Defendant's answer was "no." The IJ's immediate response was "then I will
10 have to order removal."

11 The important question is not whether the Defendant had the \$100 in his pocket. The
12 questions is whether he could have sufficient funds so that he could "[depart] at [his] own
13 expense." 8 U.S.C. § 1229(c)(1). The IJ knew that the Defendant had family in the United
14 States because they discussed whether any of them were citizens. Due process would demand
15 some exploration of whether Defendant could obtain the money from his family. Moreover,
16 the Defendant had not been advised that he might need a \$100 at the hearing to take advantage
17 of the voluntary departure option. That information should have been included either in the
18 Notice to Appear or orally when IJ continued the first hearing. Neither was done. Phones
19 were available for the Defendant to make calls to attorneys so they could also have been used
20 before the second hearing to obtain the \$100, if the Defendant had known that he would need
21 it. The court concludes that due process requires more than merely asking if the Defendant
22 has \$100 on his person, considering the major consequences that can attach to having a prior
23 deportation on a person's record.

24 It is also true that the IJ did not explain the consequences of a removal versus a
25 voluntary departure which would have increased the likelihood that Defendant may have
26 interrupted the IJ to say that he could in fact get the money. No opportunity was provided for

1 the Defendant to say or do anything as the IJ moved directly to the order of removal after the
2 Defendant answered that he did not have \$100.

3 Once a defendant shows that a due process violation occurred he/she must then show
4 prejudice. *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000). To establish
5 prejudice the Defendant "does not have to show that he actually would have been granted
6 relief." *Id.* He only needs to show "that he had a plausible ground for relief from deportation."
7 *Id.* (internal quotations omitted). Defendant had no criminal history that would make him
8 ineligible for voluntary departure so that outcome was dependant on whether the \$100 was
9 available. Defendant presents a Declaration that he did not have the \$100 with him but if
10 given an opportunity he could have obtained it from his parents or family. This assertion
11 appears reasonable, since he had family and \$100 is not a large amount of money, so the
12 Defendant had a plausible ground for relief. Thus, the Defendant has shown both a due process
13 violation during the deportation hearing and the requisite prejudice to succeed on this collateral
14 attack of the deportation hearing and the Indictment must be dismissed. Accordingly,

15 **IT IS ORDERED THAT** the Defendant's Motion to Dismiss, filed January 29, 2007,
16 **Ct. Rec. 19 is GRANTED.** The Indictment is **DISMISSED WITH PREJUDICE.**

17 The District Court Executive is directed to file this Order and provide copies to counsel.

18 **DATED** this 28th day of February, 2007.

19
20 s/ Wm. Fremming Nielsen
21 WM. FREMMING NIELSEN
22 SENIOR UNITED STATES DISTRICT JUDGE
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